

## NOTES

# A BORDER DEFERRED: STRUCTURAL SAFEGUARDS AGAINST JUDICIAL DEFERENCE IN IMMIGRATION NATIONAL SECURITY CASES

ALI SHAN ALI BHAI†

## ABSTRACT

*When confronted with cases lying at the intersection of immigration and national security, the judiciary has abided by a consistent principle: the president knows best. Since the late nineteenth century, rather than deciding these cases on the merits, courts have instead deferred to the executive branch. Courts' reluctance to engage in judicial review of these policies is based on the traditions of special national security deference and the plenary power doctrine. Deference of this kind is not without its proponents, who cite the executive branch's vast institutional advantages in the realms of immigration and national security. Detractors, on the other hand, contend that this deference renders the president beyond judicial review, creating a blank check for the executive branch to take questionable acts in immigration matters with little to no scrutiny by the legislative or judicial branches. After the Supreme Court granted certiorari to hear a challenge to President Trump's controversial travel ban case in *Trump v. Hawaii*, both sides saw it as an opportunity to either preserve or jettison deference to the executive branch in this area.*

*But with a narrow 5–4 holding, neither side could claim victory. Instead, the future of plenary power remains an open question. To fill the gap, this Note proposes practical safeguards for the judiciary to act as a counterweight to unchecked executive authority in the realm of immigration law.*

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*“Maybe it’s the instinct of every immigrant, born of necessity or of longing: Someplace else will be better than here. And the condition: if only I can get to that place.”*

—Cristina Henríquez<sup>1</sup>

## INTRODUCTION

In 1948, Jewish refugee Ellen Knauff arrived in New York Harbor, brimming with hope and eager for a new beginning in the United States.<sup>2</sup> After leaving her native Germany for Czechoslovakia during the Hitler regime, Ellen escaped to England as a refugee.<sup>3</sup> There, she worked for the Royal Air Force through the German surrender; after the war, she returned to Germany to work with the U.S. War Department, earning multiple commendations along the way.<sup>4</sup> While living in Frankfurt, she met and married her husband, Kurt Knauff, an American citizen and decorated veteran of World War II.<sup>5</sup> As peace and stability slowly crept back across the globe, Ellen and her husband made arrangements to end their journey in the United States.<sup>6</sup>

However, upon her arrival, she was confronted with an unexpected hitch. An immigration official—equipped with nothing more than suspicions of Ellen’s intentions in the United States—stopped her.<sup>7</sup> Those suspicions were enough to detain Ellen at Ellis Island without a hearing, access to legal resources, or visitation privileges.<sup>8</sup> Finally, after months of uncertainty, immigration officials decided to permanently exclude her from the country because of concerns—later proven to be unfounded—that Ellen was a Communist spy.<sup>9</sup> In denying her entry, the government “refused her request for a hearing, and refused to provide evidence of its charges to anyone,”

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1. CRISTINA HENRÍQUEZ, *THE BOOK OF UNKNOWN AMERICANS* 286 (2014).

2. Peter Margulies, *The Travel Ban and Presidential Power*, *LAWFARE* (Apr. 23, 2018, 8:00 AM), <https://www.lawfareblog.com/travel-ban-and-presidential-power> [<https://perma.cc/4FMT-XVFQ>].

3. *See United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 539 (1950) (“[Knauff] left Germany and went to Czechoslovakia during the Hitler regime.”); Margulies, *supra* note 2 (“Ellen Knauff was a refugee of the second world war from Czechoslovakia . . .”).

4. *Knauff*, 338 U.S. at 539; Margulies, *supra* note 2.

5. *Knauff*, 338 U.S. at 539.

6. *See id.* (“On August 14, 1948, [Knauff] sought to enter the United States to be naturalized.”).

7. *Id.* at 539–40; Margulies, *supra* note 2.

8. *Knauff*, 338 U.S. at 539; Margulies, *supra* note 2.

9. Margulies, *supra* note 2.

simply noting her admission would be “prejudicial to the interests of the United States.”<sup>10</sup>

Ellen’s story triggered headlines and scrutiny from layperson and policymaker alike.<sup>11</sup> After a public outcry, the Supreme Court agreed to take up her case in *United States ex rel. Knauff v. Shaughnessy*.<sup>12</sup> At issue was whether the United States could justifiably exclude “the alien wife of a citizen who had served honorably in the armed forces” without a hearing.<sup>13</sup>

In a contentious decision, the Supreme Court upheld Ellen’s exclusion.<sup>14</sup> Although her challenge against the government revolved around the undisclosed security reasons behind her detention,<sup>15</sup> the Court refused to inquire into the government’s evidence for excluding Ellen.<sup>16</sup> Instead, the Court reasoned that as an exercise of the government’s power as a sovereign and over the foreign affairs of United States, “the decision to admit or to exclude an alien may be lawfully placed with the President,” and that “such authority is final and conclusive.”<sup>17</sup> In a holding reflecting immense deference to the executive branch, the Court declared “it is not within the province of any court . . . to review the determination of the political branch of the Government to exclude a given alien.”<sup>18</sup>

The *Knauff* decision was hardly a popular one.<sup>19</sup> Nevertheless, it was—and still is—consistent with the Court’s jurisprudence. When confronted with controversial national security questions, the judiciary has typically deferred to the executive branch based on the long-standing tradition of special national security deference.<sup>20</sup> This

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10. *Knauff*, 338 U.S. at 539–40.

11. Louis Fisher, *To Have and To Hold: Those in U.S. Custody Deserve Reliable Evidence*, LEGAL TIMES (Mar. 16, 2009), <https://www.loc.gov/law/help/usconlaw/pdf/knauff.2009.pdf> [<https://perma.cc/PNL4-AJF5>].

12. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

13. *Id.* at 539.

14. *Id.* at 547.

15. *Id.* at 540.

16. *See id.* at 543 (“[I]t is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.”).

17. *Id.*

18. *Id.* (emphasis added).

19. *See* Fisher, *supra* note 11 (detailing the public scrutiny of the decision).

20. *See, e.g., Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972) (“We hold that when the Executive exercises this power . . . the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification . . .”); *Shaughnessy v. United States ex rel.*

tradition is grounded in the belief that the executive branch is better equipped to make relevant judgments on national security issues because it has access to more resources and expertise on these complicated matters.<sup>21</sup>

However, cases like *Ellen Knauff's* have troubled observers over the last century and a half—cases that lie at the cross-section between immigration and national security. In those cases, deference to the executive is understood as a natural outgrowth of the government's plenary power over immigration matters. This “plenary power doctrine” contends only the political branches of government—Congress and the president—have control over immigration policy.<sup>22</sup> Since the late nineteenth century, the judicial branch has employed this “constitutional oddity”<sup>23</sup> to refuse to review immigration cases it believes bears on the security of the nation. Even in the modern era, federal courts have invoked the plenary power doctrine to retreat from the immigration debate that looms so large over the nation's conscience, with some “suggest[ing] that the [doctrine] precludes *any* judicial scrutiny of immigration decisions affecting arriving immigrants.”<sup>24</sup> However, in doing so, courts often decline to hear the merits of Equal Protection, Due Process, and First Amendment claims that would be entertained in nonimmigration cases<sup>25</sup>—meaning that fundamental constitutional protections are being eclipsed by the judiciary's deference to the executive branch.<sup>26</sup>

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Mezei, 345 U.S. 206, 210–11 (1953) (upholding on national security grounds the executive branch's exclusion of an Eastern European resident who left the United States to visit his mother).

21. See Eric A. Posner, *Deference to the Executive in the United States After September 11: Congress, the Courts, and the Office of Legal Counsel*, 35 HARV. J.L. & PUB. POL'Y 213, 216 (2012) (noting that deference to the executive branch on national security issues “rests on basic intuitions about institutional competence: that the executive can act more decisively and with greater secrecy than Congress or the courts because it is a hierarchical body and commands forces that are trained and experienced in countering security threats”).

22. *Id.*

23. Shawn E. Fields, *The Unreviewable Executive: National Security and the Limits of Plenary Power*, 84 TENN. L. REV. 731, 732 (2017).

24. Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1671 (2007).

25. Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C. L. REV. 77, 83 (2017) (“[F]rom the late nineteenth century through the Cold War, the Supreme Court routinely sustained government decisions that would plainly violate constitutional rights had they occurred outside of the immigration context, reasoning that the political branches possess ‘plenary power’ to exclude, deport, and detain noncitizens without judicial restraint.”).

26. Natsu Taylor Saito makes a similar argument in the international human rights context: [U]nder the guise of the plenary power doctrine, the courts not only refuse to apply the basic protections “guaranteed” by the Constitution, but they also refuse to apply

Though discussion over the plenary power doctrine has been robust, this debate has “reached a stalemate.”<sup>27</sup> Proponents of the doctrine point to the vast institutional advantages of the political branches as the reason why “immigration’s plenary power doctrine endures.”<sup>28</sup> Yet its detractors remain concerned that unchecked government actions on immigration, such as the Chinese Exclusion Act, are merely smokescreens for “expressions of broader xenophobic sentiments.”<sup>29</sup> Critics also note that ever since the passage of the Immigration Reform and Control Act of 1986, Congress has steadily taken a backseat to the president in immigration policymaking.<sup>30</sup> As a result, some fear that this doctrine has created a blank check for the executive branch to take questionable acts in immigration matters with little to no scrutiny by the legislative or judicial branches.<sup>31</sup>

However, this scholarly stalemate was poised to be broken when the Supreme Court granted certiorari in *Trump v. Hawaii*,<sup>32</sup> the controversial case challenging President Trump’s travel ban on seven countries, five of which had Muslim-majority populations.<sup>33</sup> For many commentators, the case promised either to spell the doctrine’s end or to cement its longevity for years to come.<sup>34</sup>

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international law, leaving the basic rights of immigrants, American Indians, residents of U.S. “territories,” and other sectors of the American population essentially unprotected by anything except the goodwill of Congress.

Natsu Taylor Saito, *The Plenary Power Doctrine: Subverting Human Rights in the Name of Sovereignty*, 51 CATH. UNIV. L. REV. 1115, 1121–22 (2002).

27. Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827, 827 (2013).

28. David A. Martin, *Why Immigration’s Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 29 (2015).

29. Jonathan Hafetz, *Immigration and National Security Law: Converging Approaches to State Power, Individual Rights, and Judicial Review*, 18 ILSA J. INT’L & COMP. L. 625, 628 (2012).

30. Fields, *supra* note 23, at 731–32.

31. *Id.* at 732.

32. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

33. *Id.* at 2405, 2421.

34. Compare Fields, *supra* note 23, at 732 (“But there is something uniquely different about these executive orders: unlike all other immigration policies enacted since the plenary power doctrine was established in 1889, these orders appear likely to be struck down as unconstitutional.”), with Hans A. von Spakovsky, *Why Trump’s Immigration Order Is Legal and Constitutional*, HERITAGE FOUND. (Mar. 20, 2017), <https://www.heritage.org/immigration/commentary/why-trumps-immigration-order-legal-and-constitutional> [https://perma.cc/T9XV-HFBBF] (“When this executive order finally gets to the Supreme Court, the justices could do no better than adopting [the plenary power doctrine] in whole when they overrule these improper, erroneous, and plainly wrong court decisions that have obstructed the president’s ability to protect our country.”).

Although neither camp claimed a clear victory, the Supreme Court decided to uphold President Trump's travel ban. In a majority opinion written by Chief Justice Roberts, the Court affirmed the president's authority to exclude individuals from these seven nations for national security reasons, noting the broad statutory conferral of power to the president on matters of immigration.<sup>35</sup> In dissent, Justice Sotomayor condemned the majority's acceptance of a policy that "masquerades behind a facade of national-security concerns" without delving into an inquiry of the government's underlying motives.<sup>36</sup> The legal community was similarly divided: some celebrated that "[t]he Supreme Court wasn't willing to substitute its own judgment on national security issues for that of the president,"<sup>37</sup> while others took umbrage with the majority's thin legal reasoning<sup>38</sup> and "oppos[ed] the court's ruling on personal and moral grounds."<sup>39</sup>

Though hotly contested, President Trump's travel ban—in reality, a series of executive orders—was not without precedent. In the last six decades, multiple presidents on both sides of the aisle have issued immigration restrictions under the broad authority granted to them by Congress. For example, President Carter issued an executive order during the Iran hostage crisis effectively limiting the entry of Iranian nationals;<sup>40</sup> President Reagan blocked the entry of foreigners who had contracted HIV;<sup>41</sup> and President Obama "dramatically slowed the processing of refugee requests" from Iraq after two Iraqi refugees were

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35. *Trump v. Hawaii*, 138 S. Ct. at 2423.

36. *Id.* at 2433 (Sotomayor, J., dissenting).

37. Hans A. von Spakovsky, *Supreme Court Trump Travel Ban Decision Is an Important Victory for Our National Security*, HERITAGE FOUND. (June 28, 2018), <https://www.heritage.org/immigration/commentary/supreme-court-trump-travel-ban-decision-important-victory-our-national> [<https://perma.cc/3B8R-DJJX>].

38. See, e.g., Anthony D. Romero, *The Supreme Court Failed Us*, ACLU (June 27, 2018), <https://www.aclu.org/blog/immigrants-rights/supreme-court-failed-us> [<https://perma.cc/L2J2-UY7T>] ("The five justices ruling in the majority performed a routine of judicial acrobatics to construct a legal argument sanctioning religious discrimination."); Shirin Sinnar, *Trump v. Hawaii: A Roadmap for New Racial Origin Quotas*, STAN. L. SCH. BLOGS (June 26, 2018), <https://law.stanford.edu/2018/06/26/trump-v-hawaii-a-roadmap-for-new-racial-origin-quotas> [<https://perma.cc/JVH3-4B9P>] (arguing that the Court's decision was incorrect because "the travel ban violated a non-discrimination provision of the immigration law").

39. Shadi Hamid, *The Travel Ban, the Law, and What's "Right,"* BROOKINGS (June 28, 2018), <https://www.brookings.edu/opinions/the-travel-ban-the-law-and-whats-right> [<https://perma.cc/JH75-W45U>].

40. Exec. Order No. 12,172, 44 Fed. Reg. 67,947 (Nov. 26, 1979).

41. Steve Connor, *US Lifts Ban on Foreigners with HIV Imposed by Reagan*, INDEPENDENT (Jan. 5, 2010), <https://www.independent.co.uk/news/world/americas/us-lifts-ban-on-foreigners-with-hiv-imposed-by-reagan-1857769.html> [<https://perma.cc/MX2A-2VEQ>].

suspected of making bombs while living in Kentucky as refugees.<sup>42</sup> Nevertheless, in comparison to his predecessors, President Trump's ban is far broader and lacks the immediately pressing national security justification of previous executive orders.<sup>43</sup> Thus, although the executive's exercise of plenary immigration power may be nothing new, the breadth of this power is increasing.

This Note proposes a limit on this mushrooming and largely unchecked authority by imposing practical judicial and legislative safeguards. To be clear, this Note does not suggest that the plenary power doctrine should be abandoned in its entirety;<sup>44</sup> rather, this Note attempts to reconcile the divergent perspectives on the plenary power doctrine by proposing a mechanism for meaningful judicial oversight that maintains respect for the president's expertise on national security matters. Congress could certainly act to substantively curtail the president's authority in the immigration arena, but bipartisan immigration legislation seems particularly elusive in the current political climate. For that reason, this Note focuses on practical mechanisms for courts to act as a counterweight to unchecked executive authority in the realm of immigration law.

This Note proceeds in three parts. Part I provides background on the evolution of the plenary power doctrine from the Chinese

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42. Michelle Mark, *There are Major Differences Between Trump's Immigration Ban and Obama's 2011 Policy*, BUS. INSIDER (Feb. 1, 2017, 8:24 PM), <https://www.businessinsider.com/big-differences-between-trumps-immigration-ban-obamas-2011-policy-2017-2> [<https://perma.cc/KY5B-KMYV>].

43. See Ann M. Simmons & Alan Zarembo, *Other Presidents Have Blocked Groups of Foreigners from the U.S., But Never So Broadly*, L.A. TIMES (Jan. 31, 2017), <https://www.latimes.com/nation/la-na-immigrant-ban-history-20170130-story.html> [<https://perma.cc/2Q48-8V2U>] (“What is clear is that Trump's use of the law goes far beyond that of any past president.”).

44. For examples of this approach, see Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 (1984) (“[M]y conclusion is that the Court should abandon the special deference it has accorded Congress in the field of immigration.”); Cornelia T. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in Miller v. Albright*, 1998 SUP. CT. REV. 1, 4 (1998) (arguing that “the courts lack adequate justifications for the plenary power doctrine”); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 339 (2002) (describing the plenary power doctrine as “long decried among rights advocates and within the academy”). In his article, *Why Immigration's Plenary Power Doctrine Endures*, Professor David A. Martin wryly commented: “It almost seems an obligatory rite of passage for scholars embarking on the study of immigration law to provide their own critique of plenary power or related doctrines of deference.” Martin, *supra* note 28, at 30. But ironically, by his own admission, Martin's hands are not clean either: thirty-two years prior, he published his own plenary power rite-of-passage piece as a young scholar. *Id.* at n.3.

Exclusion Act to *Trump v. Hawaii*. Part II highlights modern problems with the doctrine. Finally, Part III suggests two practical safeguards to limit unchecked executive power. First, the courts should impose an articulation requirement on any immigration-policy directives taken by the president that invoke national security concerns to trigger judicial deference. Second, Congress should designate one circuit to hear challenges to executive policies on immigration.

## I. LEGAL BACKGROUND

Although *Trump v. Hawaii* inspired a wealth of scholarly debate, most of the foundational precedent discussed in the leadup to the decision dates back to the late nineteenth century. This Part stretches back to those early days to chronicle how responsibility for immigration slowly concentrated in the executive branch over the centuries. Section A explores the roots of the plenary power doctrine with a focus on the Chinese Exclusion Act. Section B examines the development of judicial and legislative deference to the executive branch during World War II. Finally, Section C links these historical lessons with the recent *Trump v. Hawaii* decision.

### A. *The Chinese Exclusion Act and the Birth of Immigration Plenary Power*

In the early 1850s, the American west coast witnessed its first surge of non-European immigrants. Galvanized by California's booming gold rush and increasingly amicable relations between China and the United States,<sup>45</sup> Chinese immigrants headed to America to make their fortunes working in gold mines.<sup>46</sup> Soon afterward, Chinese immigrants were working as laborers across a variety of industries, from agriculture and garment production to railroad construction.<sup>47</sup>

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45. In order to accommodate the influx of Chinese immigrants, China and the United States signed the Burlingame-Seward Treaty of 1868, which, among other things, granted privileges to U.S. and Chinese citizens traveling between the two countries. For an in-depth chronology of diplomacy and treaty arrangements between the United States and China during this period, see generally Mark A. Ryan, *Legal and Diplomatic Aspects of Chinese Immigration to the United States, 1868–1894*, 3 CHINESE (TAIWAN) Y.B. INT'L L. & AFF. 22 (1983).

46. *Chinese Immigration and the Chinese Exclusion Act*, U.S. DEP'T OF STATE ARCHIVES (2001), <https://2001-2009.state.gov/r/pa/ho/time/gp/82014.htm> [<https://perma.cc/X2S8-3U7C>].

47. See *id.* (noting that Chinese immigrants worked in these industries for lower wages due to their need to send money home, outstanding loans from securing passage to America, and weaker political bargaining power).



Unfortunately, the more entrenched Chinese immigrants became in American society, the more other working-class Americans began to resent their presence. Politicians seized upon this animus to recast Chinese immigrants as scapegoats for the nation's monetary woes, "pointing the finger at Chinese immigrants for economic hardship and labeling them fundamentally incapable of assimilation."<sup>48</sup> Eventually words turned to violence: during the 1870s and early 1880s, 153 anti-Chinese riots erupted throughout the United States<sup>49</sup> where "Chinese communities were harassed, attacked, or expelled."<sup>50</sup>

In the wake of this civil unrest, the onus was on Congress to respond. After a series of debates, Congress passed the Chinese Exclusion Act of 1882, making the Chinese "the first nationality to be singled out for restriction of immigration."<sup>51</sup> Often obscured in the historical consciousness of the United States, the Chinese Exclusion Act composed a rather dark chapter of American history. Even though the modern perception of the Act is overwhelmingly negative,<sup>52</sup> the anti-immigrant sentiments in the late nineteenth century that motivated this kind of legislation were popular among the common man and elite members of society alike.<sup>53</sup> Moreover, this time period

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48. Braden Goyette, *How Racism Created America's Chinatowns*, HUFFINGTON POST (Nov. 11, 2014, 7:35 AM), [https://www.huffingtonpost.com/2014/11/11/american-chinatowns-history\\_n\\_6090692.html](https://www.huffingtonpost.com/2014/11/11/american-chinatowns-history_n_6090692.html) [<https://perma.cc/L346-58NK>]. Several American politicians, like Senator James A. Blaine, were responsible for fanning the flames of anti-Chinese sentiment with their rabble-rousing rhetoric. See ANDREW GYORY, *CLOSING THE GATE: RACE, POLITICS, AND THE CHINESE EXCLUSION ACT 3* (1998) (noting that Senator Blaine "declared on the Senate floor: 'We have this day to choose . . . whether our legislation shall be in the interest of the American free laborer or for the servile laborer from China'").

49. Mark R. Ellis, *Denver's Anti-Chinese Riot*, ENCYCLOPEDIA GREAT PLAINS (2011), <http://plainhumanities.unl.edu/encyclopedia/doc/egp.asam.011> [<https://perma.cc/JBY5-J2BR>].

50. Robert C. Kennedy, *Justice for the Chinese*, N.Y. TIMES LEARNING NETWORK (2001), <https://archive.nytimes.com/www.nytimes.com/learning/general/onthisday/harp/0327.html> [<https://perma.cc/F8JA-KH9W>].

51. Ryan, *supra* note 45, at 22–23.

52. See, e.g., Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1833 (2007) (arguing that the *Chae Chan Ping* Court "disguised its rationale," hiding the race-based grounds that "clearly motivated the law"); Hafetz, *supra* note 29, at 628 (acknowledging that "racist attitudes towards the Chinese helped spark passage of the Chinese Exclusion Act and laid the groundwork for other racially motivated laws that followed").

53. See Kat Chow, *As Chinese Exclusion Act Turns 135, Experts Point to Parallels Today*, NPR (May 5, 2017, 6:06 PM), <https://www.npr.org/sections/codeswitch/2017/05/05/527091890/the-135-year-bridge-between-the-chinese-exclusion-act-and-a-proposed-travel-ban> [<https://perma.cc/3CC3-H68T>] ("[A]nti-immigrant measures in the 1880s . . . were driven by both working class people and elites.").

“set the groundwork for immigrant detention centers and the country’s first large-scale deportation of a single immigrant group.”<sup>54</sup>

Among other things, the Act suspended the entry of Chinese laborers into the United States for the next ten years.<sup>55</sup> In 1884, Congress created an exception for Chinese workers who wanted to leave the United States temporarily, but it required them to carry a certificate of reentry.<sup>56</sup> In 1887, a Chinese laborer named Chae Chan Ping received one of these certificates and left the United States only to return after one year.<sup>57</sup> On October 8, 1888, Chae Chan Ping arrived in San Francisco on a steamship after a one-month-long journey from Hong Kong.<sup>58</sup> But unbeknownst to him, the law had changed: on October 1, 1888—seven days prior to his arrival—Congress passed an act to deny *all* Chinese reentry to the United States.<sup>59</sup> After the collector of the port refused to honor his certificate, Chae Chan Ping was detained aboard the steamer by the ship captain.<sup>60</sup> A petition for a writ of habeas corpus was filed on his behalf in Northern District of California but was denied.<sup>61</sup>

The Supreme Court granted certiorari on Chae Chan Ping’s appeal in 1889, where it heard arguments in *Chae Chan Ping v. United States*<sup>62</sup> alleging that Congress’s suspension of Chinese reentry violated treaties signed by China and the United States.<sup>63</sup> After determining that Congress did not violate these treaties,<sup>64</sup> Justice Stephen J. Field, writing for the majority, noted that Congress was motivated by the perception that “Chinese laborers had a baneful effect upon the . . . interests of the State . . . upon public morals . . . and [were] a

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54. *Id.*

55. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, 58–59.

56. Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The “Plenary Power” Justification for On-Going Abuses of Human Rights*, 10 ASIAN AM. L.J. 13, 15 (2003).

57. *Chae Chan Ping v. United States*, 130 U.S. 581, 582 (1889).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

63. *Id.* at 600.

64. *Id.* The Court spent a significant amount of time addressing the history of the Burlingame-Sewell Treaty and the development of laws excluding Chinese laborers. *Id.* at 590–95. While it acknowledged that the 1888 Act did in fact violate the terms of the treaty, the Court held that this did not invalidate Congress’s action as “[t]he treaties were of no greater legal obligation than the act of Congress.” *Id.* at 600. Accordingly, it ruled that because Congress’s act was the most recent, it superseded the Burlingame-Seward treaty. *Id.* (“[T]he last expression of the sovereign will must control.”).

menace to our civilization.”<sup>65</sup> Despite this pronouncement of animus, Justice Field noted “[t]his court is not a censor of the morals of other departments of the government; it is not invested with any authority to pass judgment upon the motives of their conduct.”<sup>66</sup>

The decision in *Chae Chan Ping* was the first time that the Court articulated the immigration plenary power doctrine.<sup>67</sup> Specifically, Justice Field noted that if Congress “considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security,” then that “determination is conclusive upon the judiciary.”<sup>68</sup> Based on the deference analysis, the Court held that the decisions to restrict immigration for the security of the nation rest solely with the government and “are not questions for judicial determination.”<sup>69</sup> Thus, the roots of the plenary power doctrine were prudential, not constitutional. Even though the Constitution itself designates the legislature as having the power “[t]o establish a uniform Rule of Naturalization,”<sup>70</sup> it grants neither the executive nor the legislative branch absolute power to make decisions on immigration.<sup>71</sup> The basis for the Court’s reasoning in *Chae Chan Ping*, therefore, relied on the idea that the ability to exclude immigrants is “an incident of sovereignty”<sup>72</sup>—in other words, the U.S. government has an absolute right to regulate its borders because of its unique powers as an independent nation, notwithstanding its enumerated powers under the Constitution.<sup>73</sup> The Court’s decision is also based on practical

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65. *Id.* at 595.

66. *Id.* at 602–03.

67. See Martin, *supra* note 28, at 30 (“*Chae Chan Ping v. United States* . . . is traditionally taken as the fountainhead of the plenary power doctrine.”).

68. *Chae Chan Ping*, 130 U.S. at 606.

69. *Id.* at 609.

70. U.S. CONST. art. I, § 8, cl. 4. In contrast to the broader immigration processes that govern entry to the United States, naturalization deals with the power of the government to grant immigrants citizenship after they are already in the United States.

71. *Id.*; see also Fields, *supra* note 23, at 752 (noting that immigration authority has been seen as “emanating from inherent national sovereignty rather than from the Constitution”); Martin, *supra* note 28, at 31 (“[The Court] used the concept to establish, through structural reasoning, that the federal government in fact does possess the authority to regulate migration, even though such a power is not enumerated in the Constitution.”).

72. *Chae Chan Ping*, 130 U.S. at 609.

73. Professor Sarah Cleveland discusses this notion in her article, stating:

[Justice Field] characterized the immigration power as an exclusive federal power incident to sovereignty, derived from the absolute sovereign right of all nations to deny aliens entry. The power was presumed to be incorporated in the general powers of the national government over foreign affairs and was not subject to judicial review.

considerations. Namely, as a matter of aptitude, it is necessary for the political branches of government—who are “alone competent to act upon the subject”—to retain total control over immigration issues.<sup>74</sup>

As part of its decision, the Court also adopted a rather broad interpretation of national security. Although the Court acknowledged that the country was not at war during this period—which would act as the most natural trigger for this kind of deference—it pointed out that relevant national security threats remained—namely, the riots and civil unrest stemming from rampant anti-Chinese sentiment.<sup>75</sup> Stated differently, it was not the actions of the Chinese immigrants themselves that was the problem but rather the *reaction* by other Americans who did not approve of their presence. The result is a standard for national security that relies heavily on the political branches of government to define the national security concern itself, which can be as broad as necessary.

*B. World War II, Statutory Developments, and the “Unreviewable Executive”*

Although the *Chae Chan Ping* decision initially left plenary power over immigration to both Congress and the president, that power was gradually ceded to the executive branch during the twentieth century. Today, almost all immigration reform comes out of the White House; Congress has not passed meaningful immigration legislation since the Reagan administration.<sup>76</sup> This Section explores the origins and evolution of this shift, starting with the Second World War.

Even before the horrors of the Holocaust manifested in full, the anti-Semitism spreading throughout Europe during the early 1930s had generated a substantial Jewish refugee crisis.<sup>77</sup> This animus was especially pronounced in Germany, where unrelenting attacks on

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Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 133 (2002). For a thorough examination of the history of the “powers inherent in sovereignty” theory, see generally *id.*

74. *Chae Chan Ping*, 130 U.S. at 609.

75. *Id.* at 603–05.

76. See Fields, *supra* note 23, at 731–32 (“In the three decades since President Reagan’s executive immigration orders and the accompanying Immigration Reform and Control Act of 1986, not a single major immigration measure has passed in Congress.”).

77. See *America and the Holocaust*, FACING HIST. & OURSELVES, <https://www.facinghistory.org/defying-nazis/america-and-holocaust> [https://perma.cc/2WYD-6U35] (stating that in “1938, delegates from 32 nations met . . . to discuss how to respond to the [Jewish] refugee crisis” caused by the German government’s human rights violations).

Jewish quality of life, including restricted access to housing, financial assets, and the freedom of movement, spurred Jewish citizens to flee the country.<sup>78</sup> As German annexation and occupation efforts expanded across the continent, the crisis only intensified.<sup>79</sup>

But the political climate of the United States in 1939 was anything but welcoming. Not only was the country gearing up for potential global conflict, but it had also been suffering from the effects of the Great Depression for the past decade.<sup>80</sup> This economic woe combined with nationalist sentiment to produce predictable results: a 1939 public-opinion poll found that “83% of Americans were opposed to the admission of refugees.”<sup>81</sup>

The hostility toward refugees during this period punctuated the expansion of plenary power doctrine. In *Shanughsey v. United States ex rel. Mezei*,<sup>82</sup> the Supreme Court upheld the exclusion of an Eastern European man who, after residing in the United States from 1923 to 1948, visited his sick mother in Hungary and unsuccessfully attempted to return to the United States afterwards.<sup>83</sup> Citing *Chae Chan Ping* and *Knauff*, the Court held that “the Attorney General, acting for the President, may shut out aliens whose ‘entry would be prejudicial to the interest of the United States . . . without a hearing.’”<sup>84</sup>

At the same time as the Court was expanding the plenary power doctrine, Congress was busy delegating a great deal of its immigration authority to the executive branch. This power shift accelerated with the passage of the Immigration and Nationality Act of 1952 (“INA”).<sup>85</sup> The INA, as amended, accomplishes this shift in two primary ways. First, federal agencies under the Department of Homeland Security (“DHS”) are responsible for enforcing immigration law and policy

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78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* Interestingly, Congress did admit some refugees—just not Jewish refugees. Although the legislative and executive branches rushed to pass bills allowing English children to enter the United States, similar actions to allow twenty-thousand Jewish children to enter were summarily rejected. Rafael Medoff, Opinion, *During World War II, America Welcomed British Children. Not Jewish Ones*, WASH. POST (Mar. 23, 2018, 6:24 PM), [https://www.washingtonpost.com/opinions/during-world-war-ii-america-welcomed-british-children-not-jewish-ones/2018/03/23/fac1df64-2dd8-11e8-8dc9-3b51e028b845\\_story.html](https://www.washingtonpost.com/opinions/during-world-war-ii-america-welcomed-british-children-not-jewish-ones/2018/03/23/fac1df64-2dd8-11e8-8dc9-3b51e028b845_story.html) [https://perma.cc/L93E-9SL3].

82. *Shanughsey v. United States ex rel. Mezei*, 345 U.S. 206 (1953).

83. *Id.* at 211–12.

84. *Id.* at 211.

85. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163.

under the INA, including U.S. Citizenship and Immigration Services, Customs and Border Protection, and Immigration and Customs Enforcement.<sup>86</sup> Second, the INA codifies the governing principle of the plenary power doctrine by broadly conferring the power to take exclusionary immigration actions to the president:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.<sup>87</sup>

This section of the INA does not include any explicit conditions or qualifications; instead, it embeds the principles of plenary power deep in the fabric of the president's statutory authority.

The effective result of these judicial and legislative developments was to give the executive branch control of most immigration-policy decisions. For example, Congress delegates the power “to set immigration screening policy” to the executive “by making a huge fraction of noncitizens deportable” at the president’s discretion.<sup>88</sup> But because the population of deportable noncitizen immigrants has swelled over the last several years, this “functionally gives the President the power to exert control over the number and types of immigrants inside the United States.”<sup>89</sup> These delegations have created what Professor Shawn Fields calls “the Unreviewable Executive”: an executive whose immigration determinations are entirely unchecked by either Congress or the judiciary.<sup>90</sup> Even though the Court in *Chae Chan Ping* found that both the executive *and* legislative branches have power over such determinations, “not a single major immigration measure has passed in Congress” after the Immigration Reform and

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86. WILLIAM A. KANDEL, CONG. RESEARCH SERV., R45020, A PRIMER ON U.S. IMMIGRATION POLICY 1 (2018), <https://fas.org/sgp/crs/homesecc/R45020.pdf> [<https://perma.cc/PE2V-LMVV>].

87. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212(f), 66 Stat. 163, 188 (codified as amended at 8 U.S.C. 1182(f)).

88. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 463 (2009).

89. *Id.*

90. Fields, *supra* note 23, at 731.

Control Act of 1986.<sup>91</sup> Rather, most movement in immigration law—like the Trump travel ban—has been made by executive order.<sup>92</sup>

C. *Trump v. Hawaii and the Tepid Reassurance of the Plenary Power Doctrine*

Shortly after being elected president, Donald Trump fulfilled one of his most vocal—and controversial—campaign promises: a wholesale immigration ban on individuals from countries deemed a possible terrorist threat.<sup>93</sup> On January 27, 2017, President Trump signed Executive Order No. 13,769,<sup>94</sup> which suspended the entry of foreign nationals hailing from countries Congress or the president had designated as terrorist threats for ninety days.<sup>95</sup> In this initial executive order, President Trump blocked citizens of seven Muslim-majority countries from entering the country: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.<sup>96</sup>

The next day, a number of individuals were halted from entering the United States at various airports around the country, leading the American Civil Liberties Union to file an emergency appeal with a federal court in Brooklyn challenging the executive order.<sup>97</sup> The court sided with the plaintiffs, issuing a temporary stay “ordering that refugees and others detained at airports across the United States not be sent back to their home countries.”<sup>98</sup> Instead of appealing the district court’s decision, President Trump signed Executive Order No.

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91. *Id.* at 731–32.

92. *Id.* at 732.

93. See Carol Morello, *Trump Signs Order Temporarily Halting Admission of Refugees, Promises Priority for Christians*, WASH. POST (Jan. 27, 2017), [https://www.washingtonpost.com/world/national-security/trump-approves-extreme-vetting-of-refugees-promises-priority-for-christians/2017/01/27/007021a2-e4c7-11e6-a547-5fb9411d332c\\_story.html](https://www.washingtonpost.com/world/national-security/trump-approves-extreme-vetting-of-refugees-promises-priority-for-christians/2017/01/27/007021a2-e4c7-11e6-a547-5fb9411d332c_story.html) [<https://perma.cc/LEQ5-DHK6>].

94. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017).

95. *Id.* Among other things, this executive order also halted the entry of all refugees for 120 days. *Id.*

96. Liam Stack, *Trump’s Executive Order on Immigration: What We Know and What We Don’t*, N.Y. TIMES (Jan. 29, 2017), <https://www.nytimes.com/2017/01/29/us/trump-refugee-ban-muslim-executive-order.html> [<https://perma.cc/DY48-P79T>].

97. Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, *Darweesh v. Trump*, No. 1:17-cv-00480 (E.D.N.Y. Jan. 28, 2017); see also Christopher Mele, *Judge Who Blocked Trump’s Refugee Order Praised for ‘Firm Moral Compass,’* N.Y. TIMES (Jan. 29, 2017), <https://www.nytimes.com/2017/01/29/us/judge-trump-refugee-order-ann-donnely.html> [<https://perma.cc/N6QM-DAXH>].

98. Mele, *supra* note 97.

13,780.<sup>99</sup> Intended to be less controversial, this updated version of the travel ban both delayed the date when the new restrictions would become effective and allowed individuals who previously had permission to enter the United States to continue to do so.<sup>100</sup> But this revised travel ban did not fare much better in the courts than its predecessor, with multiple district courts enjoining the enforcement of the executive order the day before it became effective.<sup>101</sup>

Although the Supreme Court granted partial enforceability of the second executive order, it was apparent to the Trump administration that something had to change if the travel ban were to withstand judicial scrutiny.<sup>102</sup> The final version of the ban was issued via presidential proclamation on September 27, 2017, with two significant alterations.<sup>103</sup> First, the new proclamation added two new, non-Muslim-majority nations—North Korea and Venezuela—to the restricted list.<sup>104</sup> Second, the proclamation was watered down to primarily cover visa restrictions.<sup>105</sup>

The State of Hawaii, along with fifteen other states, challenged the final version of the ban in federal court.<sup>106</sup> The District Court for the District of Hawaii granted Hawaii's request for a temporary restraining order, holding that Trump's presidential proclamation "lacks sufficient findings that the entry of more than 150 million nationals from six specified countries would be 'detrimental to the interests of the United States.'"<sup>107</sup> Instead of heading back to the drawing board once more,

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99. Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017).

100. *Id.*

101. Richard Gonzales, Joel Rose & Merrit Kennedy, *Trump Travel Ban Blocked Nationwide by Federal Judges in Hawaii, Maryland*, NPR (Mar. 15, 2017, 8:01 AM), <https://www.npr.org/sections/thetwo-way/2017/03/15/520171478/trump-travel-ban-faces-court-hearings-by-challengers-today> [<https://perma.cc/Q8RP-AZKC>].

102. *See* *Trump v. Hawaii*, 138 S. Ct. 542 (2017) (mem.) (staying the nationwide preliminary injunction against the travel ban until the various lower federal courts had a chance to review Trump's executive order); *see also* Muzaffar Chishti, Sarah Pierce & Laura Plata, *In Upholding Travel Ban, Supreme Court Endorses Presidential Authority While Leaving Door Open for Future Challenges*, MIGRATION POL'Y INST. (June 29, 2018), <https://www.migrationpolicy.org/article/upholding-travel-ban-supreme-court-endorses-presidential-authority-while-leaving-door-open> [<https://perma.cc/9ZW7-Q5D8>] ("[T]he Supreme Court . . . allowed for partial implementation with respect to foreigners without a bona fide relationship with a U.S. individual or entity.").

103. Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017).

104. *Id.*

105. *Id.*

106. *State v. Trump*, 265 F. Supp. 3d 1140 (D. Haw. 2017).

107. *Id.* at 1145 (quoting *Hawaii v. Trump*, 859 F.3d 741, 774 (9th Cir. 2017)).



the government appealed the district court's ruling to the Ninth Circuit.<sup>108</sup>

In considering the plaintiff's request for an injunction, the Ninth Circuit first evaluated the president's statutory authority under the INA.<sup>109</sup> The court noted that even though the INA confers broad power over immigration to the executive branch, that power is still subject to certain implicit limitations.<sup>110</sup> Citing the D.C. Circuit's holding in *Abourezk v. Reagan*,<sup>111</sup> the Ninth Circuit held that "the Executive cannot use general exclusionary powers conferred by Congress to circumvent a specific INA provision without showing a threat to public interest, welfare, safety or security that was independent of the specific provision."<sup>112</sup>

Turning to the travel ban, the Ninth Circuit found that the presidential proclamation exceeded the statutory authorization given by Congress because it failed to "make a legally sufficient finding that the entry of the specified individuals would be 'detrimental to the interests of the United States.'"<sup>113</sup> Although the proclamation's purported purpose was to "prevent the entry of terrorists and persons posing a threat to public safety, as well as to enhance vetting . . . processes,"<sup>114</sup> the Ninth Circuit noted Congress had already addressed those goals in the INA and created mechanisms—like the Visa Waiver Program and various vetting procedures—to effectuate them.<sup>115</sup> Because of this conflict, the Ninth Circuit found that the proclamation ran counter to congressional purpose, and upheld the restraining order to enjoin it.<sup>116</sup>

Less than one month later, the Supreme Court granted certiorari.<sup>117</sup> Although the arguments presented to the Court covered the intricate statutory and constitutional challenges to the travel ban, at least one commentator openly wondered: "Could this be the end of

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108. *Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017) (per curiam), *rev'd*, 138 S. Ct. 2392 (2018).

109. *Id.* at 683.

110. *See id.* at 685 ("Congress has delegated substantial power in this area to the Executive Branch, but the Executive may not exercise that power in a manner that conflicts with the INA's finely reticulated regulatory scheme governing the admission of foreign nationals.").

111. *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986).

112. *Hawaii v. Trump*, 878 F.3d at 685.

113. *Id.* at 673 (quoting 8 U.S.C. § 1182(f)).

114. *Id.* at 685.

115. *Id.* at 685–86.

116. *Id.* at 685, 702.

117. *Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017) (per curiam), *cert. granted*, 138 S. Ct. 923 (2018).

plenary power?”<sup>118</sup> Because the plenary power doctrine underpins the INA’s delegation of authority to the president on various aspects of immigration policy, many observers viewed the case as a harbinger of the doctrine’s future.<sup>119</sup>

Ultimately, the Supreme Court upheld President Trump’s travel restrictions in a 5–4 decision.<sup>120</sup> Writing for the majority, Chief Justice Roberts rejected the Ninth Circuit’s determination that the travel ban failed to make a sufficient finding that the entry of these immigrants “would be detrimental to the interests of the United States.”<sup>121</sup> Chief Justice Roberts noted that the text of the INA only requires the *president* to make a finding that the entry of a certain class of aliens would be detrimental to the United States.<sup>122</sup> With this proclamation, that seems to be the case: President Trump consulted with several agencies to make the independent determination that aliens from particular countries—the ones included in the proclamation itself—pose a national security risk.<sup>123</sup> Based on this assessment, the president acted directly under the broad powers conferred by the statute and properly excluded classes of people he believed to be a threat.<sup>124</sup>

In dissent, Justice Sotomayor sharply criticized the majority’s broadly deferential approach to the executive branch’s determination.<sup>125</sup> Though Chief Justice Roberts’s logistical narrative revolved around the various administrative procedures and checks that went into the travel ban, Justice Sotomayor painted a different picture, one of animus that began on President Trump’s campaign.<sup>126</sup> Specifically, Justice Sotomayor noted that during the campaign “Trump pledged that, if elected, he would ban Muslims from entering the United States.”<sup>127</sup> In her view, the majority ignored Trump’s

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118. Margo Schlanger, *Symposium: Could This Be the End of Plenary Power?*, SCOTUSBLOG (July 14, 2017, 9:45 AM), <https://www.scotusblog.com/2017/07/symposium-end-plenary-power> [<https://perma.cc/F95Z-GKFC>].

119. See *supra* note 34 and accompanying text.

120. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

121. *Id.* at 2407–10.

122. *Id.* at 2408.

123. See *id.* (arguing that President Trump fulfilled the INA’s requirements because Trump “ordered DHS and other agencies to conduct a comprehensive evaluation of every single country’s compliance with the information and risk assessment baseline” before issuing the proclamation identifying a national security interest).

124. *Id.* at 2410.

125. *Id.* at 2440 (Sotomayor, J., dissenting).

126. *Id.* at 2435.

127. *Id.*

“problematic statements” in favor of “defer[ing] to the President on issues related to immigration and national security.”<sup>128</sup> Moreover, although the majority outlined the national security issues that apparently motivated the proclamation, it failed to articulate how the wide breadth of this particular policy would achieve those state interests and justify violating the Establishment Clause.<sup>129</sup> Based on this analysis, she concluded that “even a cursory review of the Government’s asserted national-security rationale reveals that the Proclamation is nothing more than a ‘religious gerrymander.’”<sup>130</sup>

On its surface, *Trump v. Hawaii* is based on the simple question of whether the president exceeded his statutory authority under the INA. But scholarly responses to the Court’s decision focused instead on the broader concern of judicial deference to executive authority. As Professor Eugene Volokh highlights in his recap of the case, the legal principle *behind* the Court’s decision is the enduring tradition of plenary power: “The federal government may pick and choose which foreigners to let into the country . . . even based on factors—political beliefs, religion, and likely race and sex—that would normally be unconstitutional.”<sup>131</sup> One commentator was more explicit, arguing that “the outcome of [*Trump v. Hawaii*] does not turn on the president’s statutory authority to issue the travel ban under the Immigration and Nationality Act.”<sup>132</sup> Indeed, neither Justice Sotomayor’s nor Justice Breyer’s dissents paid the INA much thought, instead choosing to focus on the constitutional issues.<sup>133</sup> At the end of the day, the *Trump v. Hawaii* Court “proclaimed vast presidential powers at the intersection of two highly sensitive realms of regulation—national security and the policing of entry to the nation.”<sup>134</sup>

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128. *Id.* at 2440.

129. *Id.* at 2440–42.

130. *Id.* (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1992)).

131. Eugene Volokh, *The “Travel Ban” Decision, in One (Non-Snarky) Sentence*, VOLOKH CONSPIRACY (June 26, 2018, 11:47 AM), <https://reason.com/2018/06/26/the-travel-ban-decision-in-one-non-snark> [<https://perma.cc/7WXV-5S8F>].

132. Benjamin Wittes, *Reflections on the Travel Ban Case and the Constitutional Status of Pretext*, LAWFARE (July 6, 2018, 8:18 AM), <https://www.lawfareblog.com/reflections-travel-ban-case-and-constitutional-status-pretext> [<https://perma.cc/G8KM-UKGL>].

133. *Id.*

134. Cristina M. Rodríguez, *Trump v. Hawaii and the Future of Presidential Power over Immigration*, ACS SUP. CT. REV., 2017–2018, at 161, 164.

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The *Trump v. Hawaii* decision was not quite the litmus test prognosticators imagined. Although it remains in line with the Court's tradition of stepping back from the president's immigration actions, it hardly preserves the plenary power doctrine in amber. And even though the Court championed presidential authority in this instance, "[w]hat remains unclear is when in the future the Court will take the same approach."<sup>135</sup> The uncertainty left in *Trump v. Hawaii*'s wake is of particular importance when considering the prescriptive remedies this Note offers in Part III.<sup>136</sup>

## II. MODERN CRITICISMS OF THE PLENARY POWER DOCTRINE

Even though the plenary power doctrine and its principles continue to be invoked by courts, the doctrine has also seen its fair share of criticism. This Part delves into two such critiques, evaluating the arguments for and against deference to the executive branch. Although this Note does not contend that the plenary power doctrine should be abolished entirely, understanding these arguments will better contextualize the safeguards this Note proposes in Part III. Section A discusses how the government conflates immigration and national security issues. Section B evaluates whether the judiciary is capable of reviewing immigration cases.

### A. *Conflating National Security and Immigration*

At its base, the plenary power doctrine rests on a troubling conflation of national security and immigration issues. Part of what made decisions like *Chae Chan Ping* and *Knauff* so persuasive to legal contemporaries was the government's appeal to national security. For example, in *Chae Chan Ping*, the Court reasoned that given the government's perception of the "impossib[ility] for [the Chinese] to assimilate," it was almost certain that "our country would be overrun by them unless prompt action was taken to restrict their immigration."<sup>137</sup> In other words, the Court construed a fear of immigrant culture as a security risk—one that the government was justified in taking action against.<sup>138</sup>

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135. *First Amendment — Establishment Clause — Judicial Review of Pretext — Trump v. Hawaii*, 132 HARV. L. REV. 327, 327 (2018).

136. *See infra* Part III.

137. *Chae Chan Ping v. United States*, 130 U.S. 581, 595 (1889).

138. Hafetz, *supra* note 29, at 628.

Such conflation is not simply a historical anachronism. In fact, over the last century and a half, most discussions on immigration have at least been facially blended with rhetoric concerning national security.<sup>139</sup> Admittedly, the complexities of immigration have long touched on several facets of our democracy, from economic production and resources to “internal security, relations with other states, and the national identity.”<sup>140</sup> But much of the recent entanglement between immigration and national security began in the post-9/11 era.<sup>141</sup> In the wake of the attacks, it became abundantly clear that some changes had to be made to the federal government’s security protocols, leading to the most significant alterations to the U.S. national security infrastructure “since the start of the Cold War at the end of the 1940s.”<sup>142</sup> In effect, the United States conducted a wholesale revision of its current system, reorganizing its intelligence agencies, instating a Director of National Intelligence, and creating the DHS and the National Counterterrorism Center.<sup>143</sup> This was more than just a mere reshuffling of existing parts: it facilitated a wide expansion of the American security apparatus, whose collective budget swelled to \$1.2 trillion annually.<sup>144</sup>

Some of these security measures specifically addressed immigration issues. For example, in the two years after 9/11, the nascent DHS established a special registration program for male Arab and Muslim immigrants.<sup>145</sup> The program “fingerprinted, photographed and interviewed 85,000 Muslim and Arab noncitizens from November

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139. Chacón, *supra* note 52, at 1834.

140. CHRISTOPHER RUDOLPH, NATIONAL SECURITY AND IMMIGRATION: POLICY DEVELOPMENT IN THE UNITED STATES AND WESTERN EUROPE SINCE 1945, at 2 (2006).

141. See generally Deepa Iyer & Jayesh M. Rathod, *9/11 and the Transformation of U.S. Immigration Law and Policy*, 38 HUM. RTS. MAG., Winter 2011, [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol38\\_2011/human\\_rights\\_winter2011/9-11\\_transformation\\_of\\_us\\_immigration\\_law\\_policy](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol38_2011/human_rights_winter2011/9-11_transformation_of_us_immigration_law_policy) [https://perma.cc/RNJ6-AXE2] (discussing the growing emphasis on national security in U.S. immigration law in the decade after the 9/11 attacks).

142. Bruce Riedel, *The World After 9/11 – Part I*, YALEGLOBAL ONLINE (Sept. 6, 2011), <https://yaleglobal.yale.edu/content/world-after-911-part-i> [https://perma.cc/YS5T-8S5B].

143. *Id.*

144. Chris Hellman, *Tomgram: Chris Hellman, \$1.2 Trillion for National Security*, TOMDISPATCH.COM (Mar. 1, 2011, 10:06 AM), <http://www.tomdispatch.com/blog/175361> [https://perma.cc/8VKR-LGE5].

145. Rachel L. Swarns, *Special Registration for Arab Immigrants Will Reportedly Stop*, N.Y. TIMES (Nov. 22, 2003), <https://www.nytimes.com/2003/11/22/us/special-registration-for-arab-immigrants-will-reportedly-stop.html> [https://perma.cc/GW3H-24MG].

2002 to May 2003.”<sup>146</sup> And Congress played its part as well. For instance, the oft-criticized Patriot Act expanded the definition of “terrorist activity,” making it so that the Act’s “terrorism provisions come up most frequently as the basis for denying relief from deportation to noncitizens, such as asylum for those who claim to fear persecution if returned to their native land.”<sup>147</sup>

To be sure, immigration and national security interests are somewhat intertwined. However, this is partially due to the vast array of matters that are included under the national security umbrella. The DHS, for instance, handles a dizzying number of “topics” on a day-to-day basis, ranging from cybersecurity and disaster relief to terrorism and border protection.<sup>148</sup> Immigration certainly touches on several of these issues. For example, the endemic of drug cartels frequently using the border between the United States and Mexico to funnel weapons and money has accounted for a sizeable portion of the billions of dollars that exchange hands every year in the drug trade.<sup>149</sup> But overlap on topics like cross-border contraband does not necessarily mean immigration impacts other national security concerns to the same extent.

As an illustrative example, consider terrorism. Over the last decade and a half, immigrants have committed several terrorist attacks on U.S. soil.<sup>150</sup> But upon closer examination, the links between terrorism and immigration appear more tenuous. In the years after 9/11, the executive branch moved to detain several hundred immigrants from the Middle East as a counterterrorism measure.<sup>151</sup> However, “[f]ew if any of these aliens actually had ties to terrorism,”

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146. *Id.*

147. Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, 91 MINN. L. REV. 1369, 1384–85 (2007).

148. *Topics*, HOMELAND SEC., <https://www.dhs.gov/topics> [<https://perma.cc/C8UM-9KRQ>].

149. Ron Nixon & Fernanda Santos, *U.S. Appetite for Mexico’s Drugs Fuels Illegal Immigration*, N.Y. TIMES (Apr. 4, 2017), <https://www.nytimes.com/2017/04/04/us/politics/us-appetite-for-mexicos-drugs-fuels-illegal-immigration.html> [<https://perma.cc/8CAS-2GZV>].

150. See Ben Jacobs, *America Since 9/11: Timeline of Attacks Linked to the ‘War on Terror,’* GUARDIAN (Dec. 11, 2017, 10:23 AM), <https://www.theguardian.com/us-news/2017/nov/01/america-since-911-terrorist-attacks-linked-to-the-war-on-terror> [<https://perma.cc/95NT-YYYP>] (chronicling significant terrorist attacks since 9/11 and the national origins of those who committed them).

151. Gregory E. Maggs, *The Rehnquist Court’s Noninterference with the Guardians of National Security*, 74 GEO. WASH. L. REV. 1122, 1125 (2006).

and the vast majority of these immigrants would have had no reason for their arrest other than minor immigration violations.<sup>152</sup>

Statistics aggregated over the last several decades paint a similar picture. For example, in 2016, “some 40,000 Americans died in traffic accidents, . . . *twelve times* the fatalities from all foreign-born terrorists since 1975.”<sup>153</sup> Furthermore, of the 85,000 Muslims whose identities were catalogued as a part of the DHS’s registration program, “as well as tens of thousands screened at airports and border crossings,” only eleven were found to have any ties to terrorism.<sup>154</sup> In fact, 82 percent of all terrorist attacks on U.S. soil since 9/11 were conducted by either American citizens or permanent residents; “[r]efugees and illegal immigrants in particular have been involved in very few terrorist incidents.”<sup>155</sup> This is not to suggest that immigration has no bearing on national security issues like terrorism—but their connection can be exaggerated.

And when this exaggeration does occur, it can be damaging. For example, when the DHS’s registration program was challenged on equal protection and due process grounds in *Kandamar v. Gonzales*,<sup>156</sup> the First Circuit deferred to the government, citing “legitimate government objectives of monitoring nationals from certain countries to prevent terrorism.”<sup>157</sup> The effect of these expansions, short of actually leading to thwarted terror plots, was clear: the government

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152. *Id.*

153. Ilya Somin, *The Case Against Special Judicial Deference in Immigration National Security Cases*, WASH. POST (Oct. 22, 2017, 3:58 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/10/22/the-case-against-special-judicial-deference-in-immigration-and-national-security-cases> [<https://perma.cc/BR9J-2JSK>].

154. Swarns, *supra* note 145.

155. Niall McCarthy, *Most Terrorists in the U.S. Since 9/11 Have Been American Citizens or Legal Residents*, FORBES (Jan. 31, 2017, 8:08 AM), <https://www.forbes.com/sites/niallmccarthy/2017/01/31/most-terrorists-in-the-u-s-since-911-have-been-american-citizens-or-legal-residents-infographic> [<https://perma.cc/DTF4-J4ZT>]. Interestingly, the perception that national security and immigration are intertwined has not spilled over to the public at large. As one report mentions, although “Americans still worry about their security and . . . high rates of illegal immigration,” unlike their government “they do not conflate the two.” Gregory Michaelidis & James M. Lindsay, Opinion, *Immigrants and National Security*, BROOKINGS (May 13, 2003), <https://www.brookings.edu/opinions/immigrants-and-national-security> [<https://perma.cc/6MM8-YPEN>].

156. *Kandamar v. Gonzales*, 464 F.3d 65 (1st Cir. 2006).

157. *Id.* at 73; see also Nitin Goyal, *The Plenary Power Shield: National Security and the Special Registration Program*, CUNY SCH. L., <https://www.law.cuny.edu/legal-writing/forum/immigration-law-essays/goyal> [<https://perma.cc/CHM2-7WF2>] (“Because immigration is assumed to be tied to foreign policy and national security, courts will subject federal immigration statutes and regulations to only deferential review . . .”).

“overvalued security [and] undervalued the rights of immigrants” while “[p]anic, fear, and anger seized the day.”<sup>158</sup>

Other national security issues, like crime, are also overly conflated with immigration. For years, politicians and pundits have espoused the belief that immigration is a driving force behind national crime rates.<sup>159</sup> However, that claim lacks substantive backing. A study in the *American Journal of Public Health* found that as the number of undocumented immigrants in the United States rose between 1990 and 2014, the number of drug and driving-under-the-influence arrests significantly decreased.<sup>160</sup> Similarly, a report by the CATO Institute using data obtained from the Texas Department of Public Safety concluded that immigrants are significantly less likely to both commit and be convicted of crimes in comparison to individuals born in the United States.<sup>161</sup>

These two examples suggest that political rhetoric based on anecdotal incidents, rather than concrete facts, plays a much stronger role in conflating national security and immigration. This is troubling because modern conflation of these issues does more than create “a zero-sum contest between security on the one hand, and the rights and welfare of immigrants, on the other”<sup>162</sup>—it also “gives the president the incentive to characterize many questionable actions as raising . . . national security concerns.”<sup>163</sup> This potentially misleading

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158. Johnson & Trujillo, *supra* note 147, at 1380.

159. See Philip Bump, *Tucker Carlson's Rhetoric on Immigrants and Crime Is Wildly Misleading*, WASH. POST (Aug. 24, 2018, 5:56 AM), <https://www.washingtonpost.com/news/politics/wp/2018/08/24/tucker-carlsons-rhetoric-on-immigrants-and-crime-is-wildly-misleading> [<https://perma.cc/M2BP-X7LM>] (noting that political pundit Tucker Carlson frequently makes televised statements such as: “there are an awful lot of crimes committed by people here illegally and by noncitizens more broadly”); Amber Phillips, *‘They Carve You Up with a Knife’: Trump Is Even More Hyperbolic About Immigration Now Than in 2016*, WASH. POST (Oct. 23, 2018, 8:58 AM), <https://www.washingtonpost.com/politics/2018/10/23/trump-is-even-more-hyperbolic-about-immigration-now-than> [<https://perma.cc/LVB2-KCWX>] (“President Trump launched his long-shot presidential campaign in 2015 by declaring Mexican immigrants were drug dealers, criminals and rapists.”).

160. Michael T. Light, Ty Miller & Brian C. Kelly, *Undocumented Immigration, Drug Problems, and Driving Under the Influence in the United States, 1990–2014*, 107 AM. J. PUB. HEALTH 1448, 1448–51 (2017).

161. Alex Nowrasteh, *Criminal Immigrants in Texas*, CATO INST. (Feb. 26, 2018), <https://object.cato.org/sites/cato.org/files/pubs/pdf/irpb-4-updated.pdf> [<https://perma.cc/9V79-88HA>].

162. Hafetz, *supra* note 29, at 628.

163. Ingrid Brunk Wuerth & Ganesh Sitaraman, *The Perils of National Security Exceptionalism*, TAKE CARE (Apr. 23, 2018), <https://takecareblog.com/blog/the-perils-of-national-security-exceptionalism> [<https://perma.cc/BN6S-L7F6>].



characterization becomes even easier to make during times of national crisis, when the government has wide latitude to consider anything a national security risk.<sup>164</sup> These so-called “state[s] of exception”—periods in which the heightened threats to the country “create pressures to depart or seek exceptions from ordinary norms”<sup>165</sup>—may therefore aggrandize the executive’s plenary power over areas that may not be cut-and-dry national security issues.

### B. *The Courts’ Competence to Evaluate Immigration Issues*

Another problem with the plenary power doctrine is that it casts doubt on the judiciary’s institutional competence to assess immigration issues. To be sure, the executive branch’s superior competence on issues of national security is undisputed. As Justice Kennedy noted, “[u]nlike the President,” most federal judges do not “begin the day with briefings that may describe new and serious threats to our Nation.”<sup>166</sup> In particular, members of the executive branch are equipped with confidential information and regular access to strategic and military knowledge.<sup>167</sup> Courts, on the other hand, simply do not have the resources to “assess the executive’s intelligence and security calculations,” which creates a gap in the decision-making competence between the two branches.<sup>168</sup> For this very reason, courts do not second guess the executive branch in wartime targeting decisions<sup>169</sup> and drone strikes.<sup>170</sup>

Similar information asymmetry justifies plenary power in the immigration context. For example, in *Reno v. American-Arab Discrimination Committee*<sup>171</sup>—a case in which the Supreme Court

164. See *supra* Part I.

165. Hafetz, *supra* note 29, at 629.

166. Boumediene v. Bush, 553 U.S. 723, 797 (2008).

167. Yishai Schwartz, *This Is What It Looks Like When Courts Don’t Trust the Commander in Chief*, FOREIGN POL’Y (Mar. 21, 2017, 11:09 AM), <https://foreignpolicy.com/2017/03/21/this-is-what-it-looks-like-when-courts-dont-trust-the-commander-in-chief> [https://perma.cc/8RPE-4MWB].

168. Deeks, *supra* note 27, at 830.

169. See *El-Shifa Pharm. Indus. v. United States*, 607 F.3d 836, 846 (D.C. Cir. 2010) (“We begin by noting that the court cannot judge . . . whether the attack was ‘mistaken and not justified.’” (quoting Complaint at 30, *El-Shifa Pharm. Indus. Co. v. United States*, 402 F. Supp. 2d 267 (D.D.C. 2005) (No. 01-CV-00731))).

170. See *Jaber v. United States*, 861 F.3d 241, 247 (D.C. Cir. 2017) (“Put simply, it is not the role of the Judiciary to second-guess the determination of the Executive . . . for a particular military action in the ongoing War on Terror.”).

171. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999).

considered whether Congress had restricted federal courts' jurisdiction over selective-enforcement deportation proceedings<sup>172</sup>—the Court noted that even if the executive branch reveals its reasons for deporting a particular individual, “court[s] would be ill equipped to determine their authenticity and utterly unable to assess their adequacy.”<sup>173</sup>

Courts also keep their distance because of the secretive nature of national security matters.<sup>174</sup> For example, when such sensitive matters are at issue in civil cases, the executive often invokes the “state secrets privilege,” a doctrine that stops a court-ordered disclosure of information that might implicate national security secrets.<sup>175</sup> However, courts have not divorced themselves entirely from national security issues. In *Holder v. Humanitarian Law Project*,<sup>176</sup> for example, the Court acknowledged that even though the power to designate a group as a “terrorist organization” rested with the Secretary of State, groups that believe they were miscategorized may challenge that designation at the D.C. Circuit.<sup>177</sup> In fact, courts regularly consider cases where the legislative and executive branches have superior expertise, like “surveillance, data collection, health care, property rights, and firearms,” and “decide cases in these fields without granting the government any special deference.”<sup>178</sup>

Although the executive branch has significant expertise in the immigration arena, immigration directives should not be beyond judicial review, for two reasons. First, immigration cases do not always

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172. *Id.* at 473.

173. *Id.* at 491.

174. See Somin, *supra* note 153 (“[C]ourts and commentators sometimes reason that in all national security cases, courts should defer to the executive branch because the courts lack expertise in the field of national security . . .”). But see *id.* (critiquing this justification as unable to “withstand logical scrutiny” because courts often have little expertise on matters that they nonetheless routinely address such as antitrust suits or nuclear-waste disposal).

175. TODD GARVEY & EDWARD C. LIU, CONG. RESEARCH SERV., R41741, THE STATE SECRETS PRIVILEGE: PREVENTING THE DISCLOSURE OF SENSITIVE NATIONAL SECURITY INFORMATION DURING CIVIL LITIGATION 1–2 (2011); see also Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?* 91 YALE L.J. 570, 570–71 (1981) (“The information protected usually relates to military affairs, but has also included information that concerned peacetime foreign policy and foreign intelligence activities.”). This argument is familiar territory for so-called national security “exceptionalists” or those who opine that the executive branch should not have to disclose its reasoning for banning a certain class of people because that disclosure might include significant confidential information touching on sensitive national security matters. Wuerth & Sitaraman, *supra* note 163.

176. *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

177. *Id.* at 9.

178. Somin, *supra* note 153.

involve state secrets. Every national security matter is different: “Some national security decisions need to be shrouded in secrecy, . . . others do not.”<sup>179</sup> Even in cases that do involve sensitive information, federal courts have multiple procedures to accommodate the government’s interest in confidentiality without disposing of the lawsuit altogether. Courts can evaluate the record *in camera*<sup>180</sup> or in chambers outside of the earshot of the public.<sup>181</sup> Some federal courts have even held bifurcated oral arguments to shield confidential information from the public<sup>182</sup> or released redacted copies of briefings to maintain the government’s interest in secrecy regarding certain facts.<sup>183</sup>

Second, courts reviewing executive immigration directives are not determining whether they are effective policy measures. Nor are they passing judgment on whether the relevant security interests are valid. Rather, their responsibility in these cases is deciding whether the policy contravenes the principles of the Constitution by violating individual rights—something courts are undoubtedly expert at. Indeed, judges are highly experienced “in interpreting and enforcing individual liberties” and perhaps are even “more likely to protect our freedoms than the elected branches of government.”<sup>184</sup>

In contrast, although executive officials generally have expertise on the specific policy rationales animating national security measures, they “tend not to be particularly sensitive to the importance of civil liberties.”<sup>185</sup> Essentially, where the president or Congress are well-suited to make policy decisions, it is the courts’ responsibility to determine whether those policies run afoul of the Constitution’s various guarantees of individual liberty, including the First Amendment, Equal Protection, and Due Process Clauses. Determining whether a policy violates the Constitution is “a familiar

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179. *Id.*

180. *Id.*

181. For a detailed analysis on the merits and drawbacks of *in camera* review, see generally Ronald M. Levin, *In Camera Inspections Under the Freedom of Information Act*, 41 U. CHI. L. REV. 557 (1974).

182. See, e.g., Unopposed Motion Concerning Oral Argument at 1–2, *United States v. Sterling*, 724 F.3d 482 (4th Cir. 2013) (No. 11-5028) (describing which issues would be heard at a public oral argument and which would be argued within a sealed courtroom).

183. See, e.g., *In re Sealed Case*, No. 12-5147 (D.C. Cir. Mar. 5, 2013) (releasing a redacted opinion in a Washington, D.C. corruption case).

184. Geoffrey R. Stone, *National Security v. Civil Liberties*, 95 CALIF. L. REV. 2203, 2209 (2007).

185. *Id.* at 2208.

judicial exercise,”<sup>186</sup> one that courts should not abandon in the face of expansive presidential power.

### III. SAFEGUARDS AGAINST JUDICIAL DEFERENCE TO THE EXECUTIVE

In light of recent developments in the immigration and plenary power sphere, this Part proposes safeguards to maintain adequate checks and balances in immigration cases. At their core, these safeguards balance the institutional asymmetry between the various branches of government; specifically, they create a counterweight to the executive branch in immigration national security cases, rather than advocate for the abandonment of the plenary power doctrine in its entirety. This Part recommends two reforms. First, the judicial branch should implement an articulation requirement on executive orders seeking to invoke judicial deference. Second, Congress should designate one circuit to hear all challenges to immigration directives dealing with national security taken by the executive branch.

#### A. *Developing an Articulation Requirement*

The judiciary should impose a three-step articulation requirement on the executive branch in order to trigger plenary power deference: (1) the relevant executive order must clearly invoke the executive’s plenary power; (2) it must specify what the national security concern is; and (3) it must explicitly draw the link between the contents of the executive order and the national security issue identified. The closest analogue to this would be clear statement rules. Such rules are used by courts as a “clarity tax” on the political branches of government to “legislate exceptionally clearly when [they] wish[] to achieve a statutory outcome that threatens to intrude upon some judicially identified constitutional value.”<sup>187</sup> Because they “supplement traditional *Marbury*-style judicial review,” clear statement rules have become a popular tool to add some kind of check on the political branches of government without eliminating any discretion.<sup>188</sup> For example, in *Gregory v. Ashcroft*,<sup>189</sup> a case considering the ability to preempt states on issues of state law, the Supreme Court imposed a

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186. *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012).

187. John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 399 (2010).

188. *Id.*

189. *Gregory v. Ashcroft*, 501 U.S. 452, 452 (1991).

clear statement rule on Congress: when it intends to preempt traditional state functions, Congress must make its desire to do so unmistakably clear in the text of its statute.<sup>190</sup>

However, this Note proposes a requirement that goes slightly beyond typical clear statement rules: rather than merely requiring the president to demonstrate that she *intends* to invoke deference to immigration directives under the plenary power doctrine, the president should also describe why her action is necessary as a matter of national security. Admittedly, this exceeds what is typically demanded of actors by clear statement rules. But this added hurdle is necessary when it comes to the plenary power doctrine. Unlike other uses of the clear statement rule—such as when Congress wishes to preempt traditional state functions or when state courts claim that their judgments are based on “independent and adequate state grounds”—the president’s underlying rationale directly affects whether deference should be granted in the first place.

One of the major concerns of the plenary power doctrine’s opponents is that it gives a “carte blanche” to the executive branch.<sup>191</sup> Accordingly, to provide an additional buffer on unchecked executive action, the judiciary should implement an articulation requirement to confirm the link between the national security interests at stake and the action itself.

Practically, this articulation requirement could be imposed by either Congress or the federal courts. Although Congress would likely possess the requisite authority to do so under the plenary power doctrine, it might be less efficient than a judicial decision; however, the federal courts are also limited in that they would need a justiciable case or controversy before them to implement such a rule. Regardless, these

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190. *Id.* at 460. Clear statement rules are not the only mechanism to limit deference by rulemaking bodies. For instance, agencies are typically entitled to judicial deference of reasonable interpretations of their organic statutes under *Chevron*. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984). However, courts have created the “major questions doctrine” to pull back such authority when Congress has seemingly delegated “a policy decision of such economic and political magnitude to an administrative agency.” *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (establishing what has been called the “major questions doctrine,” although never explicitly referring to it by this name). This is because courts find it “unlikely that Congress would have implicitly delegated the authority to resolve that question to the relevant agency.” VALERIE C. BRANNON & JARED P. COLE, CONG. RESEARCH SERV., LSB10204, DEFERENCE AND ITS DISCONTENTS: WILL THE SUPREME COURT OVERRULE *CHEVRON*? 3 (2018), <https://fas.org/sgp/crs/misc/LSB10204.pdf> [<https://perma.cc/VW5N-MZMP>] (emphasis added).

191. Fields, *supra* note 23, at 732.

institutional actors would put the onus on the president to present both the national security concern at risk and how this particular measure would remedy that concern. Ostensibly, this could offset the blanket power conferred to the president on immigration matters without threatening the deference given to the executive branch's expertise on matters of national security.

The key difference between an articulation requirement and proposals offered by others is the role of the courts. For example, Professor Shawn Fields suggests that rather than granting blanket deference to the executive branch, "courts should carefully examine the record" to evaluate whether the president's immigration order actually had a nexus to national security "or merely served as a pretext for a potentially more nefarious and less justifiable reason."<sup>192</sup> Other scholars, like Professor Nitin Goyal, have proposed similar systems, where as a threshold matter before granting deference, "the court should provide more searching judicial review" to determine whether the executive branch was truly attempting to achieve a "national security or foreign policy objective[]." <sup>193</sup> In contrast, this Note proposes that the court should not perform its own investigation; rather, the onus is on the president to draw the connection because the national security issue would necessarily appear on the face of the executive order.

This proposal might be subject to two primary critiques. First, one might be concerned that this would allow the judiciary to expose sensitive national security matters. But as this Note mentioned earlier, courts can address this concern by reviewing the cases *in camera*, redacting sensitive material from the published opinion, or placing the case under seal.<sup>194</sup> Moreover, the president would not necessarily be required to place sensitive or confidential material pertaining to the nation's safety on the face of the executive order; the requirement here only mandates that the president draw a logical connection between the immigration order and the national security threat, which can be done without disclosing sensitive details.

Second, it is also possible to argue that because the articulation requirement does not involve the judiciary undertaking its own independent review, the proposal lacks any teeth. But the importance of some kind of judicial involvement serving as a buffer on previously unchecked executive action cannot be overstated. In her article *The*

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192. *Id.* at 766.

193. Goyal, *supra* note 157.

194. *See supra* notes 180–83 and accompanying text.

*Observer Effect*, Professor Ashley Deeks compares judicial involvement in national security matters to particle physics, arguing that just as particles will react differently when they are being observed, “[w]hen the executive faces a credible threat of litigation,” it will adjust the contested policy “in ways that render [the policy] more rights protective.”<sup>195</sup> President Trump’s travel ban is a recent analogous example: the first version of the ban was fairly restrictive, but after federal courts indicated their intent to uphold the challenge to the ban, Trump significantly altered its scope in subsequent versions to make it more judicially palatable.<sup>196</sup>

Any judicial involvement needs to strike a fine balance. Too much judicial scrutiny, and courts will ignite fears that they are too involved in a process traditionally reserved for the political branches of government; too little, and the executive branch will retain its unchecked authority over an increasingly controversial area of law. The articulation requirement proposed by this Note lands in the narrow middle ground. The executive branch will act differently if another entity—the judiciary—is in the picture. However, this requirement does not give the judiciary license to make political decisions; rather, it would only influence these decisions through an “observer effect.” In this way, the articulation requirement installs an additional buffer on executive action while simultaneously avoiding separation of powers concerns.

### *B. Designating a Circuit for Plenary Power Policy Challenges*

The second step that Congress should take is an *affirmative* grant of jurisdiction: it should designate one circuit to exclusively hear appeals on executive immigration actions that override constitutional rights in favor of national security. In 2002, a similar, albeit unintentional, arrangement materialized when the Second and Ninth Circuits heard a disproportionate amount of the nation’s immigration appeals.<sup>197</sup> However, these circuits were “taken by surprise” by the

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195. Deeks, *supra* note 27, at 830.

196. See *supra* Part I.C.

197. See Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1113–14, 1122–24 (2011) (explaining that the Second and Ninth Circuits were especially affected by the Department of Justice’s efforts to expedite immigration appeals because the “Second Circuit and the Ninth Circuit contain the locations where roughly three-quarters of the foreign nationals whose cases constituted the surge were initially processed by an immigration judge”).

swelling caseloads,<sup>198</sup> in part because of a substantial number of judicial vacancies in the Second Circuit.<sup>199</sup>

Instead, this Note proposes that executive immigration actions that are part of specific, wide-sweeping policies with national security justifications that infringe on constitutional rights be appealed to one circuit in particular. These appeals would be limited to cases about *executive* action, or where the president or executive branch has issued a particular immigration directive pertaining to national security. So, for example, if the president were to issue a broad executive order restricting immigration for all Russian citizens in light of growing national security concerns and individuals or groups with adequate standing wanted to challenge the order, they would appeal specifically to the circuit designated to handle these cases.

The designated-circuit approach would be effective for several reasons. First, selecting one circuit will help judges in that circuit develop an expertise in immigration directives, similar to how the Federal Circuit has emerged as an expert in the fields of patent and intellectual property law. This would allay concerns about a lack of judicial competence noted above.<sup>200</sup> Second, concentrating these cases in one circuit enhances efficiency and certainty by letting the body of law in this area develop in only one place. Finally, a designated circuit will help dispel fears around cases involving state secrets,<sup>201</sup> as courts in a designated circuit can adopt their own policies to seal cases or take them *in camera* if they are the only ones handling those cases. For example, the D.C. Circuit has its own INA confidentiality mechanisms when it reviews terrorist-group designations.<sup>202</sup>

Moreover, Congress has already adopted the designated-circuit approach for several legal-practice areas. For instance, Congress grants the D.C. Circuit exclusive jurisdiction over most administrative law cases;<sup>203</sup> the Federal Circuit decides all patent appeals in the United

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198. *Id.* at 1115; *see also id.* at 1125 (noting how Judge Dorothy Nelson of the Ninth Circuit said: “It’s just extraordinary. I’ve been on the court for 25 years, but I’ve never seen a rush . . . overwhelming us like this.”).

199. *See id.* at 1115 (describing the “judicial emergency” in the Second Circuit a few years prior to the surge of immigration appeals, “when the departures of judges and political gridlock in filling vacancies had left five out of the thirteen seats vacant”).

200. *See supra* Part II.B.

201. *See supra* Part II.B.

202. Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101–1551).

203. Eric M. Fraser, David K. Kessler, Matthew J.B. Lawrence & Stephen A. Calhoun, *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J.L. PUB. POL’Y 131, 143 (2013).



States;<sup>204</sup> and a disproportionate number of asylum cases are appealed to the Ninth Circuit.<sup>205</sup> Further research could explore which circuit would be best suited in terms of both expertise and ability. The Fifth Circuit, for example, has a considerable amount of experience with immigration cases while not being burdened with other additional responsibilities, potentially making it an ideal candidate for this proposal.

One potential drawback is logistical: How will these courts manage increasing caseload pressures as a result of these challenges being concentrated in a single circuit? After all, as mentioned before, the Second and Ninth Circuits could hardly manage their own dockets after Board of Immigration Appeals cases were directed to them.<sup>206</sup> But unlike those instances, the circuit designation proposed by this Note would not allow every immigration-related case to be directed toward this circuit; rather, only those challenges to broad immigration-policy directives taken by the executive branch would qualify. That would necessarily mean that this reform would not extend to individual immigration appeals, which are already overseen by the Board of Immigration Appeals and various federal courts.

### CONCLUSION

Unlike many, Ellen Knauff's journey did not end at the border. She continued to challenge the Supreme Court's decision to the Immigration Board, and after a three-year-long battle with various agencies, she earned entry to the United States.<sup>207</sup> Yet even after Ellen's individual release and eventual triumph, the Supreme Court decision justifying her detention remains good law—after all, Chief Justice Roberts cited the *Knauff* decision in his majority opinion in *Trump v. Hawaii*.<sup>208</sup>

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204. See Emmette F. Hale, III, *The "Arising Under" Jurisdiction of the Federal Circuit: An Opportunity for Uniformity in Patent Law*, 14 FLA. ST. U.L. REV. 229, 229 (1986) ("The Federal Circuit possesses . . . exclusive jurisdiction over all patent appeals.").

205. BARRY FRIEDMAN, MARGARET H. LEMOS, ANDREW D. MARTIN, TOM S. CLARK, ALLISON ORR LARSEN, & ANNA HARVEY, JUDICIAL DECISION-MAKING (forthcoming 2020) (manuscript at 28) (on file with the *Duke Law Journal*).

206. See *supra* notes 197–99 and accompanying text.

207. Fisher, *supra* note 11.

208. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2407 (2018) (citing *Knauff* for its proposition that "review of an exclusion decision 'is not within the province of any court'" (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950))).

Not ten years earlier, Justice Kennedy declared that “[l]iberty and security can be reconciled; and in our system they are reconciled within the framework of the law.”<sup>209</sup> But Justice Kennedy’s words ring hollow at a time when one branch’s immigration actions—which have consistently placed individual liberties on the chopping block—are insulated from any meaningful review. Deference is a powerful tool for judicial practicality, but it should not be a blank check for one branch of government to curb individual liberties in the name of national security.

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209. *Boumediene v. Bush*, 553 U.S. 723, 798 (2008).